



December 27, 1996

RSPA #1996 - 12593-1

QA#177554

Dr. D.K. Sharma
Administrator
Research and Special Programs Administration
U.S. Department of Transportation
400 Seventh St., SW
Washington, DC 20590

DOT/RSPA/OHMS
DOCKETS UNIT
97 JAN -6 PM 4:42

RE: Petition for Rulemaking

Dear Dr. Sharma:

Pursuant to 49 CFR 106.31, the Association of Waste Hazardous Materials Transporters (AWHMT) respectfully petitions for a rulemaking to establish requirements, within the hazardous materials regulations¹ (HMR), for financial responsibility consistent with those of the federal motor carrier safety regulations.² The purpose of the rule is to leave no question about RSPA's underlying authority to consider preemption of non-federal requirements concerning bonding, insurance, or indemnity under appropriate circumstances.

Interest of the Petitioner

The AWHMT represents companies that transport, by truck and rail, waste hazardous materials, including industrial, radioactive and hazardous wastes, in North America. The Association is a not-for-profit organization that promotes professionalism and performance standards that minimize risks to the environment, public health and safety; develops educational programs to expand public awareness about the industry; and contributes to the development of effective laws and regulations governing the industry.

This petition is being filed on behalf of the Association's hazardous waste transporters who are currently subject to non-uniform, non-reciprocal state-mandated bonding requirements.³ With one exception, none of these state bonding requirements recognize, or give motor carriers credit for complying with,

¹ 49 CFR Subchapter C.

² 49 CFR 387.

³ Maryland Code Ann., Environment §7-252(a)(1), COMAR 26.13.04.04; 310 Commonwealth of Massachusetts Regulations 30.411; and 35 Pennsylvania Stat. Ann. §6018.505(c), 25 Pa. Code §263.32.

federal financial responsibility requirements, including requirements specific to motor carriers of hazardous materials, waste and substances.⁴

Background for Rulemaking

With the 1975 enactment of the Hazardous Materials Transportation Act (HMTA), Congress vested the Secretary of Transportation with responsibility to prescribe regulations for the safe transportation of hazardous material.⁵ Subsequently, the Secretary assigned RSPA with the primary mandate to implement this authority through the HMRs.

The Secretary has also seen fit to share some hazardous materials responsibilities with other modal administrations. In 1980, Congress directed the Secretary of Transportation to establish regulations to require minimal levels of financial responsibility sufficient to satisfy public liability, property damage, and environmental restoration that may result from the transportation by motor vehicle in interstate or intrastate commerce of hazardous materials, substances and wastes.⁶ This authority, from the Commercial Motor Vehicle Safety Act (CMVSA), was delegated to the Federal Highway Administration. Rules implementing this authority have been in place since 1981.⁷

A basic tenet of statutory construction is that all federal statutes are presumed to be enacted by Congress with full knowledge of the existing state of the law and they are therefore to be construed in harmony with existing law, if reasonably possible.⁸ Applying this principle to bonding, insurance or indemnity requirements, RSPA has held, in its implementation of the HMTA, that no such financial responsibility requirements are necessary within the HMRs in light of the CMVSA rules. An interpretation all the more reasonable given that Congress charged the Secretary of Transportation to implement both laws.

⁴ 49 CFR 387.

⁵ 49 U.S.C. 5103(b).

⁶ 49 U.S.C. 31139(c).

⁷ 46 FR 30982 (June 11, 1981).

⁸ Watt v. Alaska, 451 U.S. 259, 267 (1981); Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir. 1971). To the extent that there is an irreconcilable conflict between statutes, the Supreme Court has determined that the more recent of the two conflicting statutes would control. Watt v. Alaska, at 267; National Resources Defense Council v. U.S. Envir. Protection Agency, 824 F.2d 1258 (1st Cir. 1987).

Over the years, RSPA has come to apply this principle to non-federal bonding requirements finding such unnecessary and "inconsistent with the HMR."⁹

Consistent with regulatory and legislative interpretation and history, hazardous waste transporters filed for preemption of the above referenced state bonding requirements arguing that they were an obstacle to the accomplishment of the purposes of the HMTA.¹⁰ Specifically, the petition for preemption -- docketed PDA-1 -- relied on the statute's goals that,

the movement of hazardous materials in commerce ... be conducted in a safe and efficient manner [and that] many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements¹¹

to determine whether an obstacle or conflict with the HMRs existed. Legislative history seemed clear about congressional intent that the HMTA "reflects the view that a high degree of uniformity of Federal, State, and local laws is required in order to promote safety and to encourage the free flow of commerce."¹² RSPA agreed and on December 11, 1992 found non-reciprocal, inconsistent state bonding requirements imposed on transporters of hazardous waste preempted.¹³

The so-called "obstacle" test preemption standard used by DOT and relied on to find preemption of divergent, non-reciprocal state bonding requirements was based historically on criteria set forth in Hines v. Davidowitz, 312 U.S. 52 (1941). Hines declares, among other things, that a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Congress ratified DOT's interpretation with the enactment of the 1990 amendments to

⁹ 54 FR 16311.

¹⁰ 56 FR 38294 (August 12, 1991).

¹¹ P.L. 101-615, §2(8) & (3).

¹² H.Rept. 101-444, Part 2, page 22, 1990.

¹³ 57 FR 58848 (December 11, 1992). Upheld on reconsideration. 58 FR 32418 (June 9, 1993).

the HMTA finding that greater uniformity in the regulation of hazardous materials in intrastate, interstate, and foreign commerce was necessary and desirable to promote the public health, welfare, and safety at all levels.¹⁴ At that time, Congress codified the obstacle test affirming that obstacle preemption was to be based on "United States Supreme Court decisions on preemption" including Hines.¹⁵ All courts, save one, have upheld DOT's consistent interpretation of its obstacle test preemption authority.

Notwithstanding congressional, judicial and administrative precedent, on August 27, 1997, the D.C. Circuit Court of Appeals overturned RSPA's PDA-1 preemption determination of state bonding requirements finding, among other things, that obstacle test preemption must rely on comparison of a non-federal requirement with a federal requirement issued pursuant to the HMTA, not RSPA's longstanding use of the full purposes and objectives of Congress.¹⁶ While we disagree with D.C. Circuit Court's rejection of the use of statutory purposes as a basis for obstacle test preemption, we realize that this objection can be cured by DOT's issuance of a rule on this topic.

Further evidence of the need for this rulemaking can be found in docket PDA-1, including court proceedings leading to the August 27th decision.

Recommended Regulatory Revision

We propose to amend 49 CFR 177.804, as follows:

Additions underlined.

§ 177.804 Compliance with Federal Motor Carriers Safety and Financial Responsibility Regulations

Motor carriers and other persons subject to this part shall comply with 49 CFR parts 390 through 397 (excluding §§ 397.3 and 397.9), and part 387 to the extent those regulations apply.

Clarification of Preemptive Authority

Congress reserved to the federal government a number of regulatory subject areas affecting hazardous materials transportation. If non-federal requirements in these areas are

¹⁴ P.L. 101-615 §2(5).

¹⁵ H.Rept. 101-444, Part 1, p. 48, 1990.

¹⁶ MA v. DOT, No. 95-5175 (D.C. Cir. August 27, 1996).

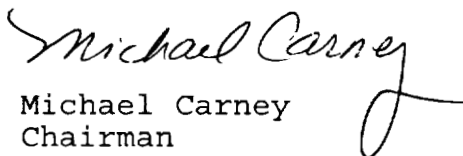
not "substantively the same as", the HMTA directs RSPA to preempt the requirements unless they are authorized by another federal law. In the course of finalizing rules based on these subject areas, RSPA must publish the date on which preemption of non-conforming, non-federal requirements will be preempted.¹⁷ While no such statutory directive exists with regard to non-substantively-the-same-as requirements, such as bonding, there is no prohibition against RSPA declaring how its more general, obstacle test preemptive authority will affect non-conforming, non-federal requirements in these areas. We request, in light of the years of effort put into the PDA-1 determination and the MA v. DOT decision, that RSPA clarify how it will apply obstacle test preemption to varying, inconsistent, non-reciprocal state bonding requirements.

Conclusion

The issue of varying, inconsistent, non-reciprocal state bonding requirements has been unsettled since 1991. If a motor carrier of hazardous materials complies with requirements established for financial responsibility by the Secretary of Transportation, whatever the statutory base, these requirements should satisfy any need for financial responsibility under the HMRs. By setting out a federal standard of financial responsibility for motor carriers engaged in hazardous materials transportation under the HMR, RSPA will not have to rely solely on statutory "purposes" of the HMTA to find preemption of inconsistent non-federal requirements. We urge that this issue be given timely consideration. In that regard, we are committed to assisting RSPA as prudent and necessary to expedite review of this issue.

Thank you for your consideration of our request.

Sincerely,


Michael Carney
Chairman

¹⁷ 49 U.S.C. 5125(b)(2).